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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 PASCUAL FRANCISCO-PASCUAL,

12 Petitioner,

13 v.
14

15 UNITED STATES OF AMERICA,

16 Respondent.
17

CASE NO. 09-CR-04151 W
13-CV-1645

ORDER DENYING MOTION TO
VACATE, SET ASIDE, OR
CORRECT SENTENCE [DOC. 68]
AND CERTIFICATE OF
APPEALABILITY

18 Petitioner Pascual Francisco-Pascual ("Petitioner"), a federal prisoner proceeding
19 *pro se*, filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. §
20 2255 (the "Motion"). The United States of America ("Respondent") opposes.

21 The Court decides the matter on the papers submitted and without oral
22 argument. See Civil Local Rule 7.1 (d)(1). For the reasons discussed below, the Court
23 **DENIES** Petitioner's motion. (*See Mot.* [Doc. 68].)

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1 **I. BACKGROUND**

2 On November 18, 2009, a one-count Indictment was filed in the Southern
3 District of California, charging Petitioner with violations of 8 U.S.C. § 1326 (a) and
4 (b). (*Opp'n* [Doc. 76] at 1:24-26.) Prior to trial, Petitioner was offered a plea deal of 57
5 months, which he subsequently refused. On August 11, 2010, a jury found Petitioner
6 guilty on all charges. (*Opp'n.* at 2:1-2.) On January 12, 2011, this Court sentenced
7 Petitioner to a term of 77 months in prison. (*Mot.* [Doc. 68] at 2.)

8 On July 12, 2013, Petitioner filed the Motion, claiming ineffective assistance of
9 counsel. Respondent opposes the Motion.

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11 **II. LEGAL STANDARD**

12 Under 28 U.S.C. § 2255, a federal sentencing court is authorized to discharge or
13 re-sentence a defendant if it concludes that “the sentence was imposed in violation of
14 the Constitution or laws of the United States, or that the court was without jurisdiction
15 to impose such sentence, or that the sentence was in excess of the maximum authorized
16 by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255. This statute is
17 intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in
18 the district of confinement, by providing an equally broad remedy in the more
19 convenient jurisdiction of the sentencing court. See United States v. Addonizio, 442
20 U.S. 178, 185 (1979); Hernandez v. Campbell, 204 F.3d 861, 864 n.4 (9th Cir. 1999).

21 The remedy available under section 2255 is as broad and comprehensive as that
22 provided by a writ of habeas corpus. See United States v. Addonizio, 442 U.S. 178,
23 184-85 (1979). But this remedy does not encompass all claimed errors in conviction
24 and sentencing. Id. at 187. A mere error of law does not provide a basis for collateral
25 attack unless the claimed error “resulted in a complete miscarriage of justice or in a
26 proceeding inconsistent with the rudimentary demands of fair procedure.” Hamilton
27 v. United States, 67 F.3d 761, 763-64 (9th Cir. 1995) (quoting United States v.
28 Timmreck, 441 U.S. 780, 783-84 (1979)).

1 **III. DISCUSSION**

2 Petitioner argues that he is entitled to vacate, set aside, or correct his sentence
3 due to ineffective assistance of counsel. Respondent contends that Petitioner fails to
4 establish the elements of an ineffective-assistance-of-counsel claim due to lack of
5 factual support. (*Opp'n* at 6.)

6 In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court
7 established a two-prong test to determine whether counsel's assistance was so defective
8 as to require reversal of a conviction. First, petitioner must show that counsel's
9 performance was deficient. Id. at 687. This prong requires petitioner to demonstrate
10 that counsel "made errors so serious that counsel was not functioning as the 'counsel'
11 guaranteed to the defendant by the Sixth Amendment." Id. In other words, petitioner
12 must demonstrate that counsel's representation fell below an *objective* standard of
13 reasonableness, considering all the circumstances presented in a particular case. Id. at
14 688. The Supreme Court further elaborated that there is a "strong presumption that
15 counsel's conduct falls within the wide range of reasonable professional assistance. . .
16 ." Id. at 699.

17 Strickland's second prong requires petitioner to prove that counsel's deficient
18 performance prejudiced the defense. Strickland, 466 U.S. at 687. In order to prove
19 prejudice, petitioner must demonstrate that counsel's errors were so serious as to
20 deprive the defendant of a fair and reliable trial. Id. Otherwise stated, the petitioner
21 must demonstrate that there is a reasonable probability that, but for counsel's defective
22 assistance, the result of the proceeding would have been different. Id. at 694.

23 Petitioner argues that his counsel's ineffectiveness arose from (1) advising him
24 proceed to trial in the face of overwhelming evidence of his guilt and without any viable
25 defense; and (2) advising him to decline the plea while failing to visit him more than
26 twice during the pretrial stage. (*Pet'r's Resp.* at 5.) The Court is not persuaded by either
27 argument.

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1 **A. Unviable Defense Strategy**

2 Petitioner contends that his counsel was ineffective by advising him to proceed
3 to trial despite overwhelming evidence against him and the lack of a viable defense
4 strategy. (*Mot.* at 6.) Specifically, Petitioner states that counsel assured him that he
5 would prevail at trial even though he had admitted his Mexican citizenship, lacked
6 proper documentation, and illegally entered the United States. (*Id.* at 10-11.)
7 Petitioner argues that, because of these admissions, his counsel lacked a viable defense
8 strategy at a trial that was functionally impossible to win. (*Id.* at 11.)

9 To succeed on the claim, Petitioner must provide specific facts showing that his
10 attorney “failed to properly inform him of the risks and benefits of proceeding to trial.”
11 United States v. Torres-Castillo, Case No. 09-1099-WQH, 2010 WL 30573345, *3
12 (S.D. Cal. Aug. 2, 2010) (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985)).
13 Accordingly, it is insufficient for Petitioner to simply identify facts or evidence that hurt
14 his defense strategy. Instead, Petitioner’s facts must indicate that he was unaware of
15 the risks and benefits of proceeding with trial. Petitioner does not allege that he was
16 unaware of the facts listed above before going to trial, or that his counsel otherwise
17 failed to properly inform him of the risks and benefits of proceeding to trial. (*See Mot.*;
18 *See Pet’r’s Resp.*) Where there are no specific facts to support ineffective assistance of
19 counsel, habeas relief is not warranted. James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

20 In this case Petitioner has failed to provided any specific factual support to
21 overcome the “strong presumption that [defense] counsel’s conduct fell within the wide
22 range of reasonable representation.” Torres-Castillo, 2010 WL 3057345, at *2 (citing
23 United States v. Ferreira-Alameda, 815 F.2d 1251, 1253 (9th Cir. 1986). Thus habeas
24 relief is inappropriate.

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26 **B. Rejection of the Plea Bargain**

27 Petitioner also claims that his counsel was ineffective by advising “Petitioner to
28 proceed to trial and reject a favorable plea.” (*Mot.* at 6.) Specifically, Petitioner states

1 that, prior to trial, counsel advised him to reject a plea bargain for 57 months that he
2 was willing to sign. (*Id.* at 10.) Despite only visiting twice during the pretrial stage,
3 counsel was able to convince Petitioner to reject the plea bargain and proceed to trial.
4 (*Id.*) Petitioner contends that, in light of his sentence of 77 months, counsel's advice
5 warrants habeas relief. (*Id.*)

6 Even if the ensuing trial is fair, a court may find ineffective assistance when
7 counsel advises the petitioner to reject a favorable plea offer. Lafler v. Cooper, 132
8 S.Ct. 1376, 1384-85 (2012). When reviewing an ineffective-assistance-of-counsel claim
9 based on rejection of a favorable plea offer, the court "must determine, first, whether
10 the [Petitioner] has identified material, specific errors and omissions that fall outside
11 the wide range of professionally competent assistance." United States v. Molina, 934
12 F.2d 1440, 1447 (9th Cir. 1991) (internal quotation marks omitted). That Petitioner
13 would like to have met with counsel more is not by itself a specific fact sufficient to
14 support a claim that defense counsel's conduct was objectively unreasonable. United
15 States v. James, Case No. 92016131, slip op. at 2 (9th Cir. Oct. 12, 1993).

16 Furthermore, Petitioner relies upon United States v. Blaylock to assert that an
17 evidentiary hearing is required "where allegations were not refuted by the record and,
18 if proven, would entitle petitioner to relief." (*Pet'r's Resp.* at 5.) The present case is
19 distinguishable because, unlike Blaylock, Petitioner was aware of the Government's plea
20 deal when he made his decision to proceed to trial. (*Mot.* at 10.)

21 Petitioner has made it clear that he is unhappy with his sentence, but has failed
22 to allege any specific facts that show his attorney "failed to properly inform him of the
23 risks and benefits of proceeding to trial." Torres-Castillo, 2010 WL 3057347, at *3
24 (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985)). Without this, there is no ineffective
25 assistance of counsel in the present case. Since Petitioner has provided no support to
26 overcome the strong presumption that his counsel provided reasonable and professional
27 assistance, the Court finds his argument lacks merit.

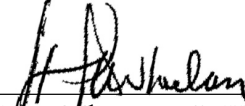
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1 **IV. CONCLUSION & ORDER**

2 In light of the foregoing, the Court **DENIES** Petitioner's § 2255 motion to
3 vacate, set aside, or correct his sentence. [Doc. 68.] And because reasonable jurists
4 would not find the Court's assessment of the claims debatable or wrong, the Court
5 **DENIES** a certificate of appealability. See Slack v. McDaniel, 529 U.S. 473, 484
6 (2000). The Clerk of the Court shall close the district court file.

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8 **IT IS SO ORDERED.**

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10 DATED: May 22, 2014

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14 Hon. Thomas J. Whelan
15 United States District Judge
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